STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2005-026

TREE REMOVAL PROJECT

COUNTY OF SAN BERNARDINO FIRE DEPARTMENT

I. INTRODUCTION

On November 18, 2005, the Acting Director of the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") finding that the Tree Removal Project ("Project") contracted by and for the County of San Bernardino/San Bernardino County Consolidated Fire Department ("County Fire") does not constitute a public work subject to the payment of prevailing wages. On December 19, 2005, the Southern California Labor Management Operating Engineers Contract Compliance Committee ("Operating Engineers") filed an administrative appeal of the Determination. County Fire submitted an opposition on January 24, 2006, Operating Engineers submitted a rebuttal on February 1, 2006, and County Fire provided further clarifying factual details, at the request of the Acting Director, on June 14, 2006.

All of the submissions have been considered carefully. Except as noted below, they raise no new issues not already addressed in the Determination. For the reasons set forth in the Determination, which is incorporated herein, and for the additional reasons stated below, the appeal is denied and the Determination is affirmed.

II. SUMMARY OF FACTS

The facts as set forth in the Determination will not be repeated. The following additional facts are provided: County Fire initiated the Project[1] because of the "Bark Beetle Emergency." The bark beetle infests only pine trees, not other species of trees.[2] Only dead, diseased or dying pine trees are being felled and removed. As part of the soil erosion mitigation work performed during the tree felling and removal on large parcels, water bars are created to control water runoff. When the tree felling and removal work is concluded, the soil used to make the water bars is smoothed out (thus removing them) and the bare earth is covered with mulch and wood chips, leaving the skid trails in the same natural condition as they existed prior to commencement of the Project. At the conclusion of the Project, the land remains forested or wooded land; any future development or construction on the land is strictly prohibited.

III. DISCUSSION

A. The Tree Felling And Removal Work Is Not Alteration Under Labor Code Section 1720(a)(1).

Operating Engineers concedes that the Determination properly cites the applicable judicial interpretation of the word "alteration" in Labor Code section 1720(a)(1)[3]

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[1]As explained in the Determination, the Project includes tree felling and removal work and, on certain large wooded parcels, soil erosion mitigation work. The erosion mitigation work includes backblading skids trails, spreading mulch and creating dirt mounds (water bars). Herein, the tree felling and removal work is discussed in section A, and the erosion control work is discussed separately in section B.

[2]Species not infested by the bark beetle include dogwood, cedar, spruce, manzanita, juniper and oak.

[3]The Determination defines "alteration" as follows: "'To "alter" is merely to modify without changing into something else,' and that term applies 'to a changed condition of the surface or the below-surface.' *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. 'Alter' as defined by Webster's Third New International Dictionary (2002) at page

Operating Engineers argues on both a factual and legal basis, however, that the tree felling and removal work is alteration. Factually, it contends that, contrary to the Acting Director's findings in the Determination,' "up to 100 percent of the trees" will be removed on any given parcel.[4] Legally, it argues that the Project modifies a particular characteristic of the land, meeting the definition of "alteration" set forth in the Determination, and therefore the Acting Director has misapplied the law.

1. The Facts Do Not Establish That Up To 100 Percent Of The Trees Will Be Felled And Removed On Any Given Parcel.

None of the evidence submitted by Operating Engineers supports its factual claim that all the trees will be felled and removed on any parcel. For example, Operating Engineers provides the Congressional testimony of Dennis Hausberger, the Chair of the Board of Supervisors of the County of San Bernardino, who advocated on behalf of the County for funding to manage the fire threat posed by the Bark Beetle Emergency. In part, his testimony states that approximately 27,000 acres of affected land are on private property, and that most of these parcels have a tree mortality rate ranging from 20 to 100 percent.

This testimony is clarified, however, by the County Fire Marshall, Peter Brierty, who is responsible for coordinating the Project. He explains that of the 27,000

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63 is 'to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else.' Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land."

[4]County Fire argues that Operating Engineers may not raise new facts on administrative appeal. Operating Engineers correctly notes that the Acting Director, under his plenary quasi-legislative authority, exercises broad discretion in making public works coverage determinations and may accept and consider additional evidence on appeal.

acres, there is no parcel where all of the trees will be removed. This is because only pine trees can be infested with the bark beetle, and thus only pine trees will die, create a fire risk, and need to be removed. All of the affected parcels are biodiverse, and include other types of trees such as dogwood, cedar, spruce, manzanita, juniper and oak, which are not infested by the bark beetle and thus do not need to be removed. Accordingly, the testimony of Mr. Hausberger does not establish that 100 percent of the trees will be removed.

Operating Engineers also submits copies of photographs taken from the County of San Bernardino website. These pictures are not relevant because they show how the land looked prior to commencement of the Project. In addition, some of the pictures were taken at locations where no tree felling work will be done.[6] As such, the photographs do not establish that 100 percent of the trees will be removed. Because neither the congressional testimony nor the photographs establish that 100 percent of the trees will be removed, Operating Engineers's factually inaccurate representations undermine its legal argument that the tree felling and removal work is alteration.[7]

2. The Determination Correctly Applies The Definition Of "Alteration."

Operating Engineers argues that the land here was once heavily forested and now is not and that therefore a particular characteristic of the land is being modified. Consequently, it argues, the tree felling and removal work

[6]County Fire represents that some pictures show staging areas in the Papoose Lake area, a location that is not the subject of any of the contracts at issue.

[7]Because this Project does not entail removal of 100 percent of the trees, we need not reach the question of whether 100 percent removal would constitute alteration.

constitutes alteration, and by finding to the contrary, the Acting Director misapplied the definition of alteration.

As discussed previously, Operating Engineers mischaracterizes the nature and extent of the tree felling and removal. In fact, the Project will remove only selected diseased or dying pine trees, leaving healthy pines and other species of trees intact. In addition, it is expected that the thinning of the trees will be temporary, and within a few years the results of the Project will no longer be noticeable. The Project specifically prohibits any type of future development or construction work that would make permanent changes to the land. Because no particular characteristic of the land is being modified by the tree felling and removal work here, the Determination correctly applied the definition of alteration.[8] The land will still be a forest, just a healthier one.

B. The Erosion Control Work Is Not Alteration Under Labor Code Section 1720(a)(1).

Operating Engineers argues that the erosion control measures, taken to mitigate the environmental impact of the tree felling and removal, may be in effect for many years and therefore the erosion control work is "alteration." As explained in the Determination, the erosion control measures are temporary or provisional and do not modify the land.

This conclusion is reinforced by County Fire's clarification that the water bars are smoothed over at the termination of the work on each parcel, and areas of exposed earth on the skid trails are covered with mulch or wood chips. The purpose of the erosion control work is to protect the forest floor while the tree felling and removal work is going on, and to leave the land in its natural state once

[8]Contrary to Operating Engineers's contentions, the fact that CalTrans and Southern California Edison have contracted for similar work at the prevailing wage rate does not require the Acting Director to find the work to be public work nor do such contracts provide evidence of the statutory meaning of "alteration."

the work is complete. Because a particular characteristic of the land is not being modified, the erosion control work does not constitute "alteration" under Labor Code section 1720(a)(1).

Operating Engineers argues that temporary measures have, in the past, been found to be alteration. Both cases it cites in support of this proposition are distinguishable. The Attorney General opinion (64 Ops.Cal.Atty.Gen. 234 (1981)) concerns work involved in a county's landfill project, including cutting temporary haul roads into the face of the landfill, providing temporary drainage ditches to remove surface water, and occasional grading. In that opinion, the Attorney General found, without any analysis, that the landfill project constituted alteration, simply noting that alteration work is not limited to buildings. The opinion gives no details about the nature and extent of the temporary haul roads or the temporary drainage ditches, nor does it analyze why this specific work constitutes alteration. The landfill project is not comparable to the making and smoothing over of the water bars at issue here.

Operating Engineers also cites a precedential public works coverage determination, PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000), for the apparent proposition that temporary work can be alteration. *Carlson*, however, is inapplicable to the instant case. The scope of work in *Carlson* included excavation of soil and placement of fill, along with installation of temporary shoring and installation of an impermeable membrane. The Director simply found that the installation of temporary shoring and an impermeable membrane was covered work under Labor Code section 1720(a). *Carlson* did not specify that this work was alteration, nor did *Carlson* address the temporary nature of the shoring or membranes. Here, the temporary nature of the erosion control

work contributed to the Acting Director's conclusion that this work is not alteration. The proper inquiry, however, is not whether the work is temporary but whether it modifies a particular characteristic of the land.

Operating Engineers also contends that the erosion control work is alteration because it involves disturbing the soil or might require heavy equipment. Whether soil is disturbed, or what type of equipment is used, is not determinative. Again, the question is whether the activity modifies a particular characteristic of the land. The erosion control measures here do not.

C. The Project Does Not Involve Maintenance Work.

For the reasons discussed below, the Determination's conclusion that the tree felling and removal work and the erosion control work do not constitute maintenance is upheld.

1. The Work Involved in the Project Is Not Included In The Definition Of Maintenance.

Title 8, California Code of Regulations, section 16000 (Cal. Code Regs., tit. 8, § 16000) provides:

> The following terms are defined for general use ... Maintenance. *Includes*:
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> (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
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> (2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
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> Exception: 1: Janitorial or custodial services of

a routine, recurring or usual nature is excluded. Exception: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.
Exception: Landscape maintenance work by "sheltered workshops" is excluded.

[Emphasis supplied.]

The Determination found that, because the Project will be performed one time only and not repeated, it is not routine, recurring or usual, and thus is not maintenance within the meaning of the regulation. On appeal, Operating Engineers concedes that the work involved in the Project is not routine, recurring or usual, but argues that the definition of maintenance is not limited to such work. Operating Engineers argues that the word "includes" as used in this regulation, is a term of enlargement and that the definition of maintenance can be expanded to include work that is not routine, recurring and usual, such as the tree felling and removal work and the erosion control work at issue here.

Whether "includes" is a term of enlargement or restriction depends upon the context and the legislative intent behind the law. Where a statute provides a list of included items as illustrative examples, "includes" is intended to be expansive. For example, in *Estate of Stoddart v. Hall* (2004) 115 Cal.App.4th 1118, the court examined a statute that listed certain types of probate orders, and held that the list was intended not to provide a definition but rather to provide illustrative examples of the types of orders the Legislature had in mind. Thus, the use of the word "includes" in that statute was meant to be expansive, not restrictive.

By contrast, the court in *Coast Oyster Company v. Perluss* (1963) 218 Cal.App.2d 492, found the use of "includes" in a statute defining "agricultural labor" for

purposes of the unemployment insurance to be restrictive, where the statute listed six specifically defined categories of services excepted from the definition of agricultural labor. Because the six categories were very specific and defined in detail, the court found that the Legislature had intended the statute to be restrictive.

Likewise, in *Ex Parte Martinez* (1942) 56 Cal.App.2d 473, the court found that taxicabs were not included in the definition of "common carrier" under the California Public Utilities Act because the pertinent statute specifically mentioned and described in great detail those things that were included, and taxicabs were not listed. Therefore, notwithstanding the use of "includes," the statute was read to be restrictive and limited to only those things that were listed.[9]

The regulation here resembles more closely the statute in *Coast Oyster Company*.[10] It defines "maintenance" by providing three specific, detailed descriptions of such work. The three categories are intended to be exhaustive; they are not merely illustrative examples of what maintenance could be.

The Department's precedential determinations consistently apply the maintenance definition to only the three types of work listed.[11] Generally, an agency's

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[9]*Loyola Marymount University v. Los Angeles Unified School District*, (1996) 45 Cal.App.4th 1256, cited by Operating Engineers, is inapposite. *Loyola* addressed a statute that used the language "those categories *may include, but are not limited to,*" (emphasis added) and found that the statute did not provide an exhaustive list of things it pertained to. Here, however, the regulation at issue (Cal.Code Regs., tit. 8, § 16000) uses the word "includes" but not the phrase "but is not limited to."

[10]The language of a regulation, such as the one here, is interpreted by using the same rules of construction as are used to interpret a statute. *Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995.

[11]See, e.g., PW 99-018, *City of Riverside Swimming Pool Maintenance* (September 23, 1999); PW 2005-014, *Sediment Removal From Storm Drains, California Department of Transportation* (October 31, 2005).

interpretation of its own regulation is entitled to deference, particularly in an area of the agency's special expertise. *Southern California Edison Co. v. Public Utilities Com'n* (2000) 85 Cal.App.4th 1086, 1105, citing to *Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1. The Department, which drafted this regulation and is charged with interpreting it, has particular expertise in the area of California public works law and therefore is entitled to due deference on its meaning.

If Operating Engineers's argument is accepted, then the definition of maintenance would be unlimited and could include virtually any activity. This would be illogical, particularly in light of the very detailed and specific definitions of maintenance given within the regulation.

2. The Work Involved In The Project Is Being Performed On Privately Owned Property.

Alternatively, Operating Engineers argues that the work meets the definition of maintenance because it is being performed on a publicly owned or operated facility, as required by the maintenance regulation (Cal. Code Regs., tit. 8, § 16000.[12] It contends that the Congressional testimony of Supervisor Hausberger establishes that this Project will be performed, in part, on public land. Supervisor Hausberger's testimony, however, is not directed to the scope of work at issue in the Determination. Rather, his testimony concerns the fire emergency at large.

Specifically, Supervisor Hausberger testified that of approximately 99,500 acres of affected land in the San Bernardino Mountains, approximately 27,000 acres are privately held. Those 27,000 acres are the subject of the contracts with County Fire at issue here. The remaining

[12]This argument contradicts Operating Engineers's position that the regulation is not limited to the types of work specifically enumerated therein and its concession that the work involved in the Project is not "routine, recurring or usual." Further, it is not

acreage is on public land and tree felling and removal work on that land will be carried out by the appropriate Federal or state agencies, not by County Fire. Operating Engineers submits, as Exhibit 6 to its appeal, Requests for Bids dated March 9, 2005 and March 15, 2005. These documents specifically state that the Project is to be performed on private property in the San Bernardino Mountains.

Therefore, even assuming the work performed for the Project met the other elements of the definition of maintenance, it cannot be maintenance within the meaning of the regulation (Cal. Code Regs., tit. 8, § 16000), because the evidence establishes that the work is being performed on private land only.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as augmented by this Decision on Administrative Appeal, Operating Engineers's appeal is denied and the Determination that the Project performed for County Fire is not a public work is affirmed. This Decision constitutes the final administrative action in this matter.

Dated: 28 July '06

John M. Rea, Acting Director

supported by the facts, which establish that the Project is being performed on private land.